



July 12, 2001

Ms. Julie Reagan Watson  
Assistant General Counsel  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2001-3012

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149354.

The Department of Human Services (the "department") received a request for a complete copy of an investigation conducted by the department's Office of the Inspector General concerning the activities of the requestor's client while employed by the department. You inform us that a portion of the requested information has been released to the requestor, but claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we note that the submitted documents contain information about Vidal Barrera that is made confidential by laws intended to protect his privacy. However, section 552.023 gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest. In this case, the requestor is an attorney representing the subject of the investigation at issue. Therefore, section 552.023 provides the requestor a special right of access to information in the submitted documents regarding Vidal Barrera which would otherwise be protected by privacy statutes.

We next note that a completed investigation made by a governmental body is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure . . . *unless they are expressly confidential under other law*:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). You inform us that the investigation at issue in this request is concluded. Therefore, the department must release the requested information in its entirety unless that information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code.<sup>1</sup>

You claim that some of the requested information is protected from disclosure under the informer's privilege. In a prior ruling from this office to the department, OR2001-1110 (2001), this office concluded, in a similar context to that presented here, that the type of information at issue here may not be withheld under the informer's privilege. The department disagreed with this ruling and filed suit in response, which suit is pending. See *Texas Department of Human Services v. John Cornyn*, No. GN101198 (53<sup>rd</sup> Judicial District, Travis County, Texas) (filed April 20, 2001). Accordingly, we decline to address your informer's privilege assertion and will allow the trial court to resolve the issue of whether the information you have marked as coming under the informer's privilege must be released to the requestor.

Section 552.101 of the Government Code also protects information that is encompassed by the constitutional or common law right to privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when (1) the information in question is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) there is no legitimate public interest in its disclosure. See *Industrial Found.*, 540 S.W.2d at 685; Open Records Decision No. 393 (1983). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type

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<sup>1</sup>You inform us that as the subject investigation was not referred to the district attorney, section 552.108, the "law enforcement exception," is not applicable to except the requested information.

protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

The types of information this office has found to be excepted from required public disclosure under constitutional or common law privacy include some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987).

You state that "although the subject investigation pertained to violations of workplace rules, allegations of sexual harassment were also made." In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common law right to privacy to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* In accordance with *Ellen*, with respect to investigations of sexual harassment, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). Accordingly, with respect to the allegations of sexual harassment contained in the information at issue, we conclude that the department must withhold information that identifies victims and witnesses. We have marked the information that we find is confidential under section 552.101 in conjunction with *Ellen*. We have also marked additional information unrelated to the sexual harassment claims that is protected from disclosure under common law or constitutional privacy.

You also raise section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information

revealing whether the employee has family members, *if the current or former employee requested that this information be kept confidential under section 552.024*. See Open Records Decision Nos. 622 (1994), 455 (1987). However, the department may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Except as indicated, we agree that the department must withhold the information you have marked under section 552.117(1) if those employees timely made the 552.024 election. We have marked additional information that must be withheld under section 552.117(1), assuming a timely 552.024 election.

You also seek to withhold certain information under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Thus, the department must withhold the Texas driver's license numbers appearing in the requested information under section 552.130.

To summarize, this decision does not address the informer's privilege assertion. The department must withhold the portions of the submitted information that we have marked under section 552.101 of the Government Code in conjunction with common law or constitutional privacy. Other portions of the requested information may be excepted from disclosure under section 552.117(1), as discussed above. Texas driver's license numbers must be withheld under section 552.130. The department must release the rest of the submitted information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 149354

Enc. Submitted documents

c: Mr. Troy C. Brown  
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(w/o enclosures)